

STATE OF MICHIGAN
COURT OF APPEALS

JANE DOE,

Plaintiff-Appellant,

V

CITY OF DETROIT,

Defendant,

and

JOSEPH JOURNEY,

Defendant-Appellee.

UNPUBLISHED

July 26, 2002

No. 225409

Wayne Circuit Court

LC No. 97-711602-NO

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff, known here as “Jane Doe,” appeals as of right from the trial court’s opinion and order, following a bench trial, finding no cause of action on plaintiff’s claims of false arrest, false imprisonment, and assault and battery. We affirm.

I. Facts and Proceedings

This case arose following an incident in which plaintiff claims that defendant¹ Joseph Journey, a Detroit police officer, sexually assaulted her. It was undisputed that the parties engaged in sexual activity. At issue was whether the activity was consensual.

A. Plaintiff’s Version

Plaintiff lived at a house with Javella Kay, her lesbian lover, along with Kay’s father and her siblings. Plaintiff and Javella had an “exclusive” relationship. Prior to her relationship with Javella, plaintiff had been lovers with Sonya Tennyson. Plaintiff claimed that, although she “prostituted” herself “for drugs” a couple of times in 1996, she has not otherwise had consensual

¹ For the purpose of this opinion, the term “defendant” will be used to refer to defendant Joseph Journey.

sex with a man since 1995, was not involved with drugs at the time of the incident, and never prostituted herself with an on-duty police officer.

On October 26, 1996, at about 4:30 a.m., plaintiff left Javella's birthday party at the house and walked to the gas station for cigarettes. A while later, longer than it should have taken, plaintiff returned to the house with two police officers, defendant and his partner. Defendant was with plaintiff when she knocked on the door. Plaintiff was hysterical, and asked people in the house to tell defendant where she had been all night. The people in the house told defendant that plaintiff had been home.

Defendant told the people in the house that plaintiff was a suspect in an armed robbery at the gas station and there was "a picture" identifying her as a robber. He said plaintiff was being arrested and taken to the station for questioning in an armed robbery. It did not appear to witnesses in the house that plaintiff and defendant knew one another. Plaintiff never mentioned anything about defendant to her lover Javella, although they had discussed all their past relationships. One witness said that defendant had "a smirk" on his face when he told them that he was taking plaintiff in for questioning, but plaintiff was not smiling and did not seem to want to go with the officer.

When plaintiff returned home about an hour later, she went into the bathroom and cried. Plaintiff's clothing no longer looked "decent" and she said that "the police" had raped her. Plaintiff said the police first took her inside the gas station and asked the attendant whether she was the person who had committed the crime. The attendant said that she was not, but the police did not let her go. Instead, they took her to her house and then drove her to the 9th precinct, where they left her in the lobby. After awhile, defendant came out and told plaintiff "let's go." Plaintiff thought she was being taken home or to another precinct for questioning. Plaintiff did not know defendant, although she was familiar with the 9th precinct because her former lover, Sonya Tennyson, complained to officers there several times because she and plaintiff fought "physically all the time."

Defendant drove plaintiff to an alley with grass in it, and ordered her to get out of the car and perform oral sex on him. Defendant started to rape her, then saw someone looking from a nearby house, so he pushed plaintiff back into the car and drove further into the alley before completing the assault. Defendant raped her from behind. When plaintiff described what had happened to her housemates, she never referred to defendant by name. One of the women in the house called 911.

In response to the 911 call, an EMS unit arrived on the scene, along with defendant and his partner in their police car. The police told the EMS personnel that plaintiff was intoxicated and that EMS should wait outside while the police went inside the house to "see what was going on." Plaintiff "was scared" when she saw defendant and ran up the stairs, with defendant following her. Plaintiff ran into a bedroom and sat on the floor in a corner, rocking back and forth. Plaintiff told one of the women in the house that defendant was the person who had raped her. Plaintiff refused to talk to the police. The EMS workers decided that they had waited "too long" and went into the house, and the police told the EMS workers that plaintiff did not want to

go to the hospital. Plaintiff, however, said that “Wynn”² had raped her and asked EMS to take her to the hospital.

Since the incident, plaintiff has been upset, “stressed out and depressed,” “crying all the time,” very moody and difficult to get along with. She no longer wants sex and does not want to go out any more. Plaintiff previously had a drug problem but had been “doing real well” until the assault. In 1997, plaintiff began to use drugs again. Her relationship with Javella ended in 1998. Plaintiff was happy before the rape, but the rape changed her life style.

William Ford, an expert on policies and practices of the Detroit Police Department, testified that plaintiff was still under the “coercive arrest power of the state” at the time of the sexual incident. Ford testified that defendant should have been fired for conduct unbecoming an officer. Psychologist Patricia Wallace, who treated plaintiff, testified that plaintiff’s symptoms were consistent with those expected of a rape victim.

B. Defendant’s Version

Before he became a Detroit police officer, defendant was a Wayne County sheriff deputy. Although he did not include the information on his application to the police department, he was convicted of assaulting a prisoner while he was working as a sheriff deputy. Defendant was married to Stephanie, and had been engaged to her at the time of the incident. During their engagement he had an “exclusive” relationship with Stephanie, but was nonetheless having sex with more than five other women, including plaintiff. Defendant’s “friend” Sonya Tennyson introduced him to plaintiff earlier that year.³ Defendant and plaintiff had sex a couple of times while plaintiff and Sonya were lovers, but it was “hit or miss,” and that they did not have sex every time they were out together.

On the night of the incident, defendant and his partner made an investigatory stop of plaintiff up near the gas station because she met the description of someone who had robbed the station. Defendant’s partner took plaintiff into the gas station to ask the attendant if he could identify plaintiff, and the attendant said that plaintiff was not the robber.

Plaintiff told them that she knew where the “perps” lived and that she would show them, but she wanted to stop home first. Plaintiff walked to the door of the house alone and put on an “act” for her family, claiming that she had been arrested. Actually, plaintiff had been in a fight with Javella and wanted to go to her mother’s house to get away from her. Plaintiff put on the “act” because she did not want the people she was living with to know that she had information about the armed robbery. Plaintiff showed defendant and his partner where the “perps” lived, but they did not write the address or information about the “perp” in their activity log.

² Plaintiff surmised that she had been saying “*when* he raped me.”

³ To the contrary, Sonya Tennyson testified that she had formerly been lovers with another police officer but that she “definitely” did not know defendant.

After showing them the “perps” house, plaintiff went into the 9th precinct with defendant and his partner to call her mother’s house to find out if someone was home to let her in. Defendant went into the report room with his partner and plaintiff was sitting in the lobby when he came out. The two of them got into the police car, went to an ATM to withdraw money, stopped for condoms and cigarettes, and tried to book a hotel room. They were unable to rent a room, so they went to a nearby house that belonged to a friend of plaintiff and had sex on the basement landing. Defendant did not use a condom. Plaintiff performed oral sex on him, then turned around and pulled down her sweatpants, and he had intercourse with her “from behind” and ejaculated. Plaintiff did not indicate in any way that she did not want to participate, and the sex was “totally” consensual. Plaintiff did not appear to be drunk or on drugs. Plaintiff told defendant she was bisexual and sometimes a female lover could not satisfy her.

The police car was equipped with a “locator.” The locator shows where defendant stopped at the ATM, the gas station and the hotel, and it indicates where he stopped during “sex time.” The area on the locator sheet could be an alley, but there was testimony that the locator is not always accurate and could be off by as much as a mile. Defendant was unable to find the house where he said that he and plaintiff had sex.

When defendant was driving plaintiff back to her house, he asked her how her former lover Sonya was and they got into a fight because plaintiff was jealous. They argued, with plaintiff telling defendant that police officers are “nothing but shit,” and then plaintiff asked defendant for fifty dollars. Defendant refused to give plaintiff the money. Soon after defendant dropped plaintiff off, he and his partner were called to respond to a rape complaint at plaintiff’s house. Defendant followed plaintiff upstairs and asked her what was going on, and she responded, “I told you I’d get you.”

No evidence of sexual activity was found on or in the police car. DNA tests indicated that defendant produced the semen that was found in plaintiff’s body. Before the DNA testing was done, and while the internal investigation was going on, defendant did not tell anyone that he had consensual sex with plaintiff and had been advised by counsel “to invoke the Fifth.” About a year after the incident, after the DNA testing had been done, defendant gave a “Garrity”⁴ statement. Defendant was disciplined for having sex while on duty, but was not criminally prosecuted because plaintiff “refused to appear and be interviewed.”

According to Detroit Police Officer Bradford, defendant was acquainted with plaintiff. Officer Bradford saw plaintiff at the 9th precinct before, inquiring about defendant. Defendant talked about several of his girlfriends in the police locker room, but Bradford could not remember any of their names except for plaintiff’s.

⁴ *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967). According to defendant’s partner, “Garrity is what we’re given as a police officer that we can be found departmentally liable, but we can’t—nothing that we say under Garrity can be used in a criminal court.”

Detroit Police Officer Johnson was defendant's partner on the night of the incident. Johnson testified that there was an armed robbery at the gas station of "two bags of chips and ice cream cone or ice cream bar." Johnson and defendant came into contact with plaintiff in connection with the robbery, and defendant put plaintiff into the back seat of the police car. Plaintiff was not handcuffed, and that was consistent with the stage of the investigation. Johnson went into the gas station, and the attendant looked out at the car and said that plaintiff was not the person who had robbed the station. Johnson and defendant told plaintiff she could go but she asked for a ride home. When they got to plaintiff's house, plaintiff told the officers that she did not want to go home and that she could point out the house where the "perps" lived. According to Johnson, plaintiff did, in fact, point out the "perps" house.

At some point, defendant "randomly" stopped the car to let plaintiff out, and he got out of the car and talked to her for a few minutes. Defendant and plaintiff both got back into the car. Defendant did not say anything and Johnson did not know why plaintiff got back into the car. At some point, plaintiff asked if she was going to the 9th precinct, or said that she did not mind going to the 9th precinct. Johnson asked plaintiff what she knew about the 9th precinct and she told him that she'd been locked up there once after a fight with her sister. Nothing happened during the forty-five minutes they were together to make Johnson believe that plaintiff and defendant knew one another.

When they got back to the police station, defendant suggested to Johnson that they take a lunch break and then defendant left. When defendant returned late after the lunch break, Johnson and defendant were dispatched to plaintiff's house to respond to the recent report of a rape.

When the police officers arrived at plaintiff's house, plaintiff ran upstairs and got into a fetal position, holding a baby in front of her. According to Johnson, plaintiff looked upset and appeared to be in a state of shock. Plaintiff refused to talk to defendant but when he left the room she told Johnson that his partner had raped her. Johnson told plaintiff to sit in the EMS vehicle and he called a supervisor. Defendant did not say anything; he did not deny raping plaintiff, and he did not say that he knew her.

Detroit Police Sergeant Balinski, who conducted the internal affairs investigation, said that Sonya Tennyson came to the station and told him that plaintiff "done played this lawsuit stuff before."

Detroit Police Officer Cameron, from recruiting, contradicted defendant's claim that he knew he was being hired by the Detroit Police Department when he quit the Wayne County Sheriff and took a large pay cut to work for a security company. If Cameron had known that defendant had been convicted of an assault on a prisoner, the police department would not have hired defendant.

II. Standard of Review

A. Factual Findings in a Bench Trial

Factual findings at a bench trial are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). “[W]here the trial court’s factual findings may have been influenced by an incorrect view of the law, an appellate court’s review of those findings is not limited to clear error.” *Walters, supra* at 456. Conclusions of law are reviewed de novo. *Id.*

B. Admission of Evidence

A trial court’s decision to admit evidence is reviewed for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001). An abuse of discretion occurs where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

III. Analysis

On appeal, plaintiff first argues that the trial court erred in finding that she was attempting an act of prostitution. Principally, plaintiff contends that since defendant described plaintiff as someone he dated, there is no support for the conclusion that her conduct was consistent with prostitution. We disagree.

The trial court found that plaintiff failed to prove by a preponderance of the evidence that there was an assault and battery because (1) there was no evidence of “brutality, bruises, scaring, cuts or any other indication of forced sex” and plaintiff “never specifically testified that there was force or threat of forced [sic] used”; (2) plaintiff failed to prove that the sexual touching was against her will; and (3) “Defendant’s testimony is the most credible testimony in that Plaintiff consented to the sex in exchange for money from the Defendant.” The trial court also noted that neither plaintiff nor defendant had been “completely candid” in their testimony. In its written opinion, the trial court stated that in reaching the conclusion that plaintiff failed to prove an assault and battery it also relied on evidence from a psychological report, introduced by plaintiff, which indicated that plaintiff obtained money to pay for drugs through prostitution, on defendant’s testimony that plaintiff asked for \$50, and on defendant’s testimony that plaintiff “told” him that she would “get” him.

Inferences from plaintiff’s description of her lifestyle and defendant’s description of their sexual encounter, if believed, support a finding that plaintiff anticipated that a sexual encounter with defendant could be profitable. As such, there is evidence to support the verdict and we cannot say that the trial court, with its ability to assess the demeanor of the witnesses, clearly erred in reaching this conclusion. MCR 2.613(C). Although there was testimony that, if believed, would lead to the conclusion that plaintiff was raped, the trial court was not required to believe that evidence. Due regard is given to the trial court’s ability to assess the credibility of witnesses. *Sparling Plastic v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998).

In light of our determination of this issue, we need not address plaintiff’s challenge to the trial court’s determination that plaintiff failed to establish any damages.

Plaintiff also argues that the trial court violated the rape-shield statute, MCL 750.520j, and the rules of evidence, MRE 608 and 609, by considering plaintiff's prior consensual sexual activity. Plaintiff frames this issue as if it were a claim that evidence was improperly used to challenge her credibility. While plaintiff may be correct that defendant could not have introduced the evidence of plaintiff's prior sexual activity, *People v Williams*, 416 Mich 25, 40-44; 330 NW2d 823 (1982) (Williams, J.), the evidence here was introduced by plaintiff herself on direct examination. Plaintiff cannot introduce and use evidence to present her case at trial and then argue on appeal that the evidence was prejudicial and denied her a fair trial. *Knapp, supra*, at 378.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder